STATE OF MICHIGAN

COURT OF APPEALS

GARY WARD and CLAUDIA WARD,

Plaintiffs/Counter Defendants-Appellees,

v

BARRON PRECISION INSTRUMENTS, L.L.C., and HASSAN PROPERTY MANAGEMENT, L.L.C.,

Defendants/Counter Plaintiffs-Appellants.

UNPUBLISHED
January 19, 2006

No. 263616
Genesee Circuit Court
LC No. 03-077358-CH

GLENN M. HOWARTH and ANNE M. HOWARTH,

Plaintiffs-Appellees,

v

BARRON PRECISION INSTRUMENTS, L.L.C., and HASSAN PROPERTY MANAGEMENT, L.L.C.,

Defendants-Appellants.

No. 263617
Genesee Circuit Court
LC No. 03-077850-CH

Before: Cavanagh, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

In these consolidated appeals, defendants challenge the trial court's orders granting plaintiffs summary disposition on counts IV and V of their complaints pursuant to MCR 2.116(C)(10). The trial court found that plaintiffs' lots in the recorded Warwick Farms subdivision plat extended to the edge of Warwick Lake, and that a private easement existed on land described as "Outlot A" in the subdivision plat in favor of the owners of lots 6-11, which also extended to the edge of Warwick Lake. We reverse and remand for further proceedings.

This action arises from a dispute between the parties concerning their rights to a strip of property lying between a row of platted lots and Warwick Lake in the Warwick Farms subdivision (hereinafter the "reserved strip"). The plat map contains a handwritten note that states, "The land lying between Lots 6-11 and Warwick Lake is reserved for the private use of the proprietors." The plat also states that Outlot A, which runs between lots 8 and 9, from Carriage Hill Drive to the reserved strip, "is reserved as private easement for the private use of the Lot Owners, Drain Commissioner and public utilities." Plaintiffs are owners of lots that abut the reserved strip. Defendants are owners of all land that was part of the original parcel, but which was not platted as part of the subdivision. The parties dispute their respective rights and interests in the reserved strip and Outlot A.

This appeal primarily concerns Count IV of plaintiffs' complaints, in which plaintiffs claimed an express easement in Outlot A, and also plaintiffs' Count V, in which plaintiffs sought a declaratory judgment that the platters intended for their lots to extend to the edge of Warwick Lake. The trial court granted summary disposition for plaintiffs on Counts IV and V, and granted plaintiffs' request for voluntary dismissal, without prejudice, of Counts I, II, and III, which asserted alternative theories concerning their rights and interests in the disputed property, as well as Count VI, which asserted a claim for nuisance. The trial court also voluntarily dismissed the Howarth plaintiffs' Count VII (also alleging a claim of nuisance), without prejudice, but granted summary disposition in favor of defendants on Count VII with respect to the Ward plaintiffs.

We review de novo a trial court's resolution of a motion for summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 539; 683 NW2d 200 (2004). Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. *Id*. at 540; see, also, MCR 2.116(C)(10) and (G)(4).

Defendants argue that the trial court erred in determining that the platters intended for plaintiffs' lots to extend to the water's edge, and in determining that plaintiffs were "proprietors" within the meaning of the plat language stating that "[t]he land lying between Lots 6-11 and Warwick Lake is reserved for the private use of the proprietors."

The determination of a party's rights under a plat dedication is a question of fact. *Dyball v Lennox*, 260 Mich App 698, 704; 680 NW2d 522 (2003). The intent of the grantor controls the scope of the grantor's dedication. *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 88; 662 NW2d 387 (2003). Where the language of a legal instrument is plain and unambiguous, it is to be enforced as written and no further inquiry is permitted. *Dyball*, *supra*. If, on the other hand, the text of the instrument is ambiguous, extrinsic evidence may be considered in order to determine the scope of the conveyance. *Id*.

Here, the plat map unambiguously shows that the lot lines end at the reserved strip. Additionally, the reserved strip is labeled as "reserved for the private use of the proprietors," thereby clearly indicating that the reserved strip is not part of the individual lots. It is well established in Michigan case law that a property owner cannot claim ownership up to the water's edge where the property description or plat map clearly indicates that the seller reserved land between the owner's property line and the water's edge. See *Fuller v Bilz*, 161 Mich 589, 591-593; 126 NW 712 (1910); *Richardson v Prentiss*, 48 Mich 88, 91-92; 11 NW 819 (1882); *Watson v Peters*, 26 Mich 508 (1873). Because the plat unambiguously shows that the individual lots are separated from Warwick Lake by the reserved strip, the trial court erred in holding that plaintiffs' lots extend to the edge of Warwick Lake.

But we conclude that questions of fact exist with regard to whether plaintiffs possess an independent interest in the reserved strip and, if so, the nature of that interest. Because these questions cannot be resolved as a matter of law, we remand this case to the trial court for further proceedings.

Defendants argue that only the original plattors, William and Edna Hovey, who are identified as proprietors in the plat, are proprietors within the meaning of the provision reserving the reserved strip "for the private use of the proprietors." Defendants therefore maintain that the Hoveys retained full ownership of the reserved strip and did not convey any interest in that strip to ACD and, accordingly, ACD could not have conveyed any interest in the reserved strip when it sold the individual lots. Plaintiffs do not clearly explain why they believe they possess an ownership interest in the reserved strip when their predecessor-in-title, American Community Developers, Inc ("ACD"), did not. Plaintiffs seem to assert that ACD was a "proprietor" and, therefore, acquired rights to the reserved strip that it passed on to its successors. Plaintiffs contend that even though ACD did not acquire ownership rights in the reserved strip, it acquired rights to use the reserved strip, which are appurtenant to the ownership rights in the lots. Although plaintiffs do not use the term "private dedication" in reference to the reserved strip, the substance of their argument is that the platters dedicated the reserved strip for private use by the lot owners in order to access Warwick Lake.

In *Little v Hirschman*, 469 Mich 553, 555-562; 677 NW2d 319 (2004), our Supreme Court held that a subdivision plat recorded in 1913 could contain enforceable private dedications to lot owners in the subdivision, although the plat statutes then in effect did not expressly authorize such dedications. The Court noted that several decisions involving subdivisions recorded before enactment of the 1967 Land Division Act, MCL 560.101 *et seq*., enforced private dedications to lot owners of lands to be used as parks or streets, or for water access. *Id*. at 560-562, citing *Minnis v Jyleen*, 333 Mich 447; 53 NW2d 328 (1952); *Dobie v Morrison*, 227 Mich App 536, 537; 575 NW2d 817 (1998); *Fry v Kaiser*, 60 Mich App 574; 232 NW2d 673 (1975); *Feldman v Monroe Twp Bd*, 51 Mich App 752; 216 NW2d 628 (1974). The Court noted that such private dedications are "irrevocable upon the sale of the lots . . . because it is reasonably assumed that the value of that lot, as enhanced by the dedication, is reflected in the sale price." *Little*, *supra* at 559. Reviewing the language of the 1925 plat act, 1925 PA 360, which implicitly acknowledged the legitimacy of private dedications, the Court determined that

"streets and parks may be dedicated to less than the general public, which, of necessity, means to private persons or entities." *Id*.[1]

Considering the specific dedication in the case before it, the Court in *Little* held that the language "dedicated to the owners of the several lots" gave the lot owners an irrevocable right to use the parks. *Id*. at 563. The Court stated "that dedications of land for private use in plats before 1967 PA 288 took effect convey at least an irrevocable easement in the dedicated land." *Id*. at 564.

In this case, however, the plat is ambiguous with regard to whether the language "reserved for the private use of the proprietors" was intended as a dedication of a private easement. On the one hand, the plat identifies the Hoveys as "proprietors," which supports a reading that the land was reserved only for the use of the Hoveys, and was not intended for the private use of the lot owners. Plaintiffs argue that the term "proprietor" refers generally to persons with an ownership interest in land and, therefore, would include ACD, the land contract vendee when the plat was recorded. The 1929 plat act then in effect does not define "proprietor," but merely provides that "[t]he word 'proprietor,' when used in this act, shall be deemed to include the plural as well as the singular and may mean either a natural person, firm, association, partnership, corporation or a combination of any of them."[2] See former MCL 560.2. However, as used in other sections of the act, the term seemed to refer only to persons and entities with an ownership interest at the time the land was platted. For example, § 2a, entitled "Duty of proprietor to make and record plat," provided that any person who subdivides lands "shall make and record a plat thereof in accordance with the provisions of this act." See former MCL 560.2a. Former MCL 560.6 required the proprietor and the engineer to sign the plat. In this case, however, we must determine the meaning of "proprietor" as intended by the parties to the plat, namely, the Hoveys and ACD, and the statute's definition of "proprietor" does not aid in this determination.

When viewed as a whole, other portions of the plat suggest that the term "proprietors" may not have been intended to refer solely to the Hoveys, or that any interest the Hoveys did retain was intended only as an easement interest. The fact that the reserved strip is depicted on the plat map suggests that it was platted as subdivision property; otherwise, there would have been no need to include it on the map. Furthermore, the note on the map indicates that it is reserved for the proprietors' "private *use*," suggesting an intent that the proprietors—whoever they are—would hold less than full ownership rights in the reserved strip. Additionally, the express inclusion of Outlot A as a private easement for the benefit of the lot owners that ends at the reserved strip suggests an intent that the reserved strip be available for use by the lot owners; otherwise, Outlot A would be an easement to nowhere.

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[1] In *Martin v Beldean*, the companion case to *Little*, the Supreme Court held that private dedications are authorized under § 253(1) of the 1967 Land Division Act, MCL 560.253(1). *Little*, *supra* at 548 n 18.

[2] The 1967 Land Division Act defines "proprietor" as "a natural person, firm, association, partnership, corporation, or combination of any of them that holds an ownership interest in land whether recorded or not." MCL 560.102(o).

For these reasons, we conclude that the language "The land lying between Lots 6-11 and Warwick Lake is reserved for the private use of the proprietors" is ambiguous with regard to the nature of the property interest that was reserved and to whom that interest was reserved. Because the language is ambiguous, resort to extrinsic evidence is appropriate. See *Dyball*, *supra* at 704.

In support of their position, plaintiffs presented the deposition testimony of Edna Hovey, who testified that she and William Hovey intended for all lot owners to have access to Warwick Lake. According to Edna, it was intended that owners of lots 1-5 could use Outlot A to get to the lake, and owners of lots 6-11 could access the lake through their frontage. She stated that lake access was a selling point for lots 6-11. This testimony lends support to plaintiffs' claim that the reserved strip was not intended for the exclusive use of the Hoveys, but was intended for use by all lot owners to access Warwick Lake.

Additionally, Bruce Pollock, a local broker and developer with expertise in the platting of subdivisions, testified that when Warwick Farms was platted, the State of Michigan maintained that a dedicated plat that included navigable water allowed the state to take control of the water as a public access lake or stream. He explained that the reservation note on the plat was intended to prevent the state from assuming control over a private lake.

In *Kraushaar v Bunny Run Realty Co*, 298 Mich 233, 241-242; 298 NW2d 514 (1941), our Supreme Court stated that there was "no such thing as a dedication between the owner and individuals" and that "[t]he public must be a party to every dedication." *Id*., quoting 16 Am Jur p 359. The Court's decision in *Kraushaar* led to confusion over the validity of private dedications, which was only recently clarified. See *Little*, *supra* at 562-563. This confusion regarding the validity of private dedications may explain why the platters labeled the reserved strip as reserved for proprietors, instead of using language that was more clear.

We conclude that the submitted evidence establishes a question of fact whether the reserved strip was intended as a private dedication, which is not appropriate for resolution by summary disposition. Furthermore, assuming arguendo that a private dedication was intended, there remains a question of fact whether the lot owners possess only an easement in the reserved strip, or whether they own it jointly in fee. In *Little*, the Supreme Court stated "that dedications of land for private use in plats before 1967 PA 288 took effect convey *at least* an irrevocable easement in the dedicated land." *Id*. at 564 (emphasis added). However, in addressing the companion case in *Martin*, the Court stated, "As we explain in *Little*, a private dedication made before 1967 PA 288 took effect conveyed an irrevocable easement, whereas MCL 560.253(1) now indicates that a private dedication conveys a fee interest . . . ." But we do not find any statement in *Little* that unequivocally indicates that pre-1967 private dedications necessarily entitle lot owners to an easement, and never a fee simple interest. Moreover, the Court's statement in *Little* that private dedications convey "at least" an irrevocable easement suggests that such dedications could convey a greater interest.

The evidence submitted below tends to show that if plaintiffs possess any interest in the reserved strip, it is only an easement interest. The language that the land is held for "private *use*" suggests an easement interest rather than an ownership interest. Additionally, plaintiffs seem to concede that ACD never acquired an ownership interest in the reserved strip, but merely passed on rights of use appurtenant to the lots. Under these circumstances, however, these questions

cannot be fully resolved by the evidence submitted on summary disposition. Accordingly, we remand this case for a proper determination of the parties' respective interests in the reserved strip in accordance with this opinion.

Defendants also argue that the trial court erred in granting plaintiffs summary disposition on Count IV of their complaints, whereby plaintiffs asserted an express easement in Outlot A. Defendants concede that plaintiffs have an easement to use and enjoy Outlot A, but argue that the trial court erred by determining that the scope of this easement extends to the edge of Warwick Lake. We agree. The plat map unambiguously indicates that Outlot A abuts the reserved strip, not the water. Therefore, the trial court erred in holding that the scope of the easement established by Outlot A extends to Warwick Lake. But if plaintiffs can establish an interest in the reserved strip, an issue that must be determined on remand, they may be able to establish at least adjoining easements in Outlot A and the reserved strip that would give lot owners access rights to Warwick Lake. Therefore, the trial court shall reconsider this issue on remand, consistent with its determination of the parties' respective interests in the reserved strip.

We agree with defendants, however, that an easement that provides access to Warwick Lake does not provide full riparian rights. In *Dyball*, *supra* at 706, this Court stated:

> Reservation of a right of way for access does not give rise to riparian rights, but only a right of way. . . . While full riparian rights and ownership may not be severed from riparian land and transferred to nonriparian backlot owners, Michigan law clearly allows the original owner of riparian property to grant an easement to backlot owners to enjoy certain rights that are traditionally regarded as exclusively riparian. [Citations and internal quotations omitted.]

Here, the trial court's order declaring Outlot A "riparian property" could be construed as granting full riparian rights to all lot owners, such as the right to construct docks or permanently anchor boats. *Id*. at 708. If, on remand, the trial court determines that the reserved strip and Outlot A form adjoining easements to allow access to Warwick Lake, its order should reflect that this does not give rise to full riparian rights. We additionally note that the trial court stated that Outlot A provides a private easement in favor of the owners of lots 6-11. The plat clearly indicates that the easement established by Outlot A was intended for the benefit of all lot owners, not just the owners of lots 6-11.

Finally, defendants argue that the trial court erred by voluntarily dismissing plaintiffs' remaining counts without prejudice. We review this issue for an abuse of discretion. *McKelvie v Mount Clemens*, 193 Mich App 81, 86; 483 NW2d 442 (1992).

Defendants argue that the dismissal without prejudice was unfair because they might have to continue the litigation if plaintiffs revive their claims. In *McKelvie*, this Court held that the defendant was not prejudiced when the state trial court dismissed the plaintiff's complaint without prejudice, enabling the plaintiff to file a similar action against the defendant in federal court. Here, plaintiffs asserted alternative theories for relief that were rendered moot when the trial court granted their motions for summary disposition on Counts IV and V of their complaints. Because we are reversing the trial court's grant of summary disposition on plaintiffs' Counts IV and V, plaintiffs should be permitted an opportunity to pursue these

alternative theories on remand to the extent applicable. Defendants have not shown that they were prejudiced by the dismissal without prejudice.

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Jane E. Markey